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No. 94-1387

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In the

Supreme Court of the United States

October Term, 1995

YAMAHA MOTOR CORPORATION, U.S.A. and YAMAHA MOTOR COMPANY, LTD.,

Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, Deceased,

Respondents.

On Writ of Certiorari To the United States Court of Appeals For the Third Circuit

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BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Did the court of appeals have jurisdiction to decide whether state or federal law applied in this case, where the court had properly assumed discretionary jurisdiction over this interlocutory appeal, and the question had been decided by the district court as a necessary part of the order that it had certified to the court of appeals?

2. Does the existence of a judicially-created federal remedy for wrongful death in territorial waters displace all state-created remedies, where (a) there is no applicable federal statutory remedy, (b) the decedent was not a seaman or a longshore worker, (c) the accident did not occur aboard a vessel, and (d) the product causing decedent's death could as readily have produced death or injury on an inland lake or river where federal maritime law does not apply?

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LUCIEN B. CALHOUN and ROBIN L. CALHOUN, Individually and as Administrators of the Estate of Natalie K. Calhoun, Deceased,

Respondents.

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

On July 6, 1989, twelve year-old Natalie Calhoun, on vacation with family friends in Humacao, Puerto Rico, was killed when her "Wavejammer" jet ski went out of control and crashed into a vessel anchored in territorial waters just off the Puerto Rican coast. The Wavejammer, a product of petitioners Yamaha Motor Corp., U.S.A. and Yamaha Motor Company, Ltd., is used for jet skiing — a popular activity among youths and teenagers, and one which has recently produced a steady increase in accidents, resulting in personal injuries and deaths in the inland and coastal waters of the United States. *See* Argetsinger, *Deaths Rise as More People Ride the Waves*, Washington Post, August 27, 1995, at 1, col. 1; Nordheimer, *It Mimics a Mosquito, But Inflicts Worse*

Injury, N.Y. Times, August 27, 1995, at 31, col. 1 (both reporting 56 jet-ski deaths in 1994). In addition to jet-skis, Yamaha also manufactures and distributes motorcycles, all-terrain vehicles, boats, snowmobiles, go-karts, generators, and golf cars.

Respondents Lucien and Robin Calhoun, individually and as administrators of their daughter's estate, brought suit in the Eastern District of Pennsylvania against petitioners, who manufactured and distributed the jet ski that Natalie was using when she was killed. Their amended complaint relied principally on diversity jurisdiction under 28 U.S.C. § 1332, but also noted the availability of admiralty jurisdiction under 28 U.S.C. § 1333 since the death occurred in territorial waters.

The Calhouns sought recovery under Pennsylvania's wrongful death statute, 42 Pa. Cons. Stat. Ann. § 8301 (1982 & Supp. 1995), and its survival statute, 42 Pa. Cons. Stat. Ann. § 8302 (1992 & Supp. 1995), alleging negligence, strict liability, and breach of the implied warranties of merchantability and fitness of purpose. Damages were sought for lost future earnings, loss of society, loss of support and services, and funeral expenses, as well as punitive damages. The amended complaint, as amplified in discovery and subsequent pleadings, focused on the design and manufacture of the jet-ski, and not on any activity that petitioners performed or failed to perform in the waters where Natalie was killed. Thus, in their October 26, 1990 answer to petitioners' interrogatory 18, respondents asserted that the jet ski was an "inherently and unreasonably dangerous and defective product" because "(1) the steering and throttle mechanism was designed and manufactured in a way that contributed to losing control of the jet ski . . . especially for young and new riders. . . . (2) Warnings regarding the dangers of this product were non-existent and the warnings on the product were inadequate in content and placement [; and] (3) The product failed to provide protection to the rider from collisions."

Petitioners moved for partial summary judgment, arguing that damages in the action are governed by federal maritime law, which does not allow recovery for future wages, loss of society, loss of support and services, or punitive damages. The district court agreed in part, holding that the state wrongful death and survival statutes were displaced by the general maritime law, as recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). It then determined that the federal common law remedy prohibited recovery for lost future wages and punitive damages, but permitted damages for loss of society and loss of support and services.

Yamaha then moved for certification of the order granting in part and denying in part its motion for summary judgment, and the Calhouns answered by moving the district court to certify all of its damages rulings pursuant to 28 U.S.C. § 1292(b). On June 21, 1993, the district court agreed and certified its entire order for interlocutory appeal, identifying the question as whether federal maritime law provides a remedy for loss of society and loss of future services and support, on which plaintiffs had prevailed, and for loss of future earnings and punitive damages, on which the district court had ruled for defendants. Less than a month later, on July 16, 1993, a motions panel of the court of appeals agreed to hear both appeals. All of the damages issues, as well as the issue of the applicability of state law including the Second Circuit's then-recent decision in *Wahlstrom v. Kawasaki Heavy Indus. Ltd.*, 4 F.3d 1084 (1993), *cert. denied*, 114 S. Ct. 1060 (1994), which conflicts directly with the decision below, were briefed and argued before a different merits panel.

As an initial matter, the merits panel determined that the proper resolution of the damages question required it to reexamine the predicate ruling of the district court that the federal maritime law displaces all state remedial statutes for wrongful deaths. The court concluded that, because that issue had been decided by the district court and because its

resolution was necessarily antecedent to resolving the damages issue, the court of appeals had jurisdiction to decide that question under 28 U.S.C. § 1292(b). Pet. App 6a-7a. The Third Circuit then concluded that the district court erred in holding that state wrongful death and survival statutes were displaced by federal maritime tort law. *Id.* at 28a-29a.

The court of appeals likened the displacement analysis to standard preemption analysis, where the presumption against preempting state laws requires the courts to construe possibly conflicting federal statutes narrowly. Federal courts must be similarly cautious in the admiralty context, the court warned, displacing state law only where it presents a "clear conflict" with federal law. *Id.* at 13a. With this presumption in mind, the court held that neither state survival nor wrongful death statutes create any conflict with respect to the judicially-created remedy for wrongful death in territorial waters. *Id.* at 28a-29a.

The court observed that neither the Death on the High Seas Act, 46 U.S.C. § 781 ("DOHSA"), nor the Jones Act, 46 U.S.C. § 688, applies to civilians killed in territorial waters and that §7 of DOHSA actually preserves state wrongful death remedies. *Id.* at 28a, 37a-38a. The court also noted that, far from any hostility toward state remedial statutes, this Court has expressly acknowledged the continued vitality of state wrongful death remedies in several of its opinions. *Id.* at 23a-25a. The court recognized that uniformity plays a role in federal maritime law, but noted that uniformity alone has never been sufficient to override statutory objectives or non-conflicting state interests and that there are several instances where federal maritime statutes themselves countenance disuniformity. *Id.* at 26a-27a. Thus, it concluded, state remedies should not be displaced by a *Moragne*-type cause of action, despite the possibility of disuniformity, since there is no "clearly articulated federal statutory scheme" that would warrant displacement of state remedies. *Id.* at 35a. In reaching that conclusion, the court also relied on the substantial countervailing interest that states

retain in policing territorial waters and in protecting their citizens through their own tort laws. *Id.* at 42a.

SUMMARY OF ARGUMENT

1. The court of appeals properly exercised jurisdiction over the issue of whether federal maritime law displaces state law in this case. We agree with petitioners and the United States that the court had jurisdiction under 28 U.S.C. § 1292(b) over the order of the district court regarding the categories of damages that were recoverable in this case, and the district court's ruling that federal rather than state law governed was necessarily antecedent to its ruling on the specific damages available under federal law. The fact that the controlling issue of law identified by the district court related to damages rather than the issue of federal versus state law is of no consequence since section 1292(b) requires the courts to certify *orders*, not *questions*, in contrast to other statutes and rules governing appellate jurisdiction that focus on the question or issue presented, not the order under appeal.

2. The issue before the Court is not whether respondents might have sued petitioners under federal maritime law, but whether the possibility of such a remedy displaces otherwise applicable state law claims based on petitioners' responsibility for the death of Natalie Calhoun. No federal statute displaces or preempts state law remedies for deaths of civilians in territorial waters, or even creates such a right of action. Instead, it is the case law from this Court which created a federal remedy as a supplement to existing but inadequate state law remedies. And, most significantly, that same case law has explicitly recognized the continued viability of state law, even as it created new federal rights.

Petitioners and their *amici* rely on several decisions in which this Court has found a federal remedy to be exclusive, but those cases are of no help to petitioners. In each of

them, there was a controlling federal statute, not simply a judicially-created remedy, especially one like that created in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which was designed to fill a gap in state and federal law and not to erect a unified federal scheme. Moreover, in those cases the Court recognized that federal statutes were the result of Congress' balancing the rights and obligations of a variety of interested persons involved in the covered occupations and/or locations. But here Congress did not make any similar tradeoffs that would justify a conclusion that federal law should exist to the exclusion of state law. Because Congress has not legislated for deaths of civilians like Natalie Calhoun in territorial waters, states remain free to fashion their own legislative remedies.

Petitioners and their *amici* urge this Court to sacrifice state wrongful death remedies on the altar of uniformity, despite the absence of express congressional authorization. However, absolute uniformity of maritime law has never been the dispositive factor in maritime and other decisions of this Court. Indeed, Congress itself has created disuniformity in the maritime law by, for example, providing different statutory remedies for seamen and civilians killed on the high seas. This Court has been reluctant to displace state law, except where state law alters the primary conduct of actors in regimes in which there are important federal interests at stake. Since Yamaha is already subject to state law for jet ski accidents that occur on inland rivers and lakes, and since the state statutes only prescribe the types of damages that are recoverable, and do not create a different duty of care, state law can readily co-exist with federal maritime law and should not be displaced.

Finally, Congress has never shied away from its obligation to regulate maritime law when it thought it necessary, as it did in the Death on the High Seas Act, the Jones Act, and the Longshore and Harbor Workers' Compensation Act. Moreover, it has established a uniform statute of limitations for *all* maritime torts involving death or

personal injuries, regardless of location. *See* 46 U.S.C. § 763a. If Congress decides that a uniform remedy for deaths in territorial waters is desirable, Congress will create one. But until it does, the existing state remedies should not be swept aside by the courts.[1]

ARGUMENT

I. THE COURT OF APPEALS HAD JURISDICTION OVER THE QUESTION OF WHETHER FEDERAL LAW DISPLACED STATE LAW IN THIS CASE.

In response to the question posed by the Court in granting certiorari, petitioners and their *amici* argue that the court of appeals had jurisdiction under 28 U.S.C. § 1292(b) to address the question of whether federal law displaces state law in this case since that question was decided by the district court and was antecedent to the question identified in the district court's certification order. Because we agree, we will only add a few additional supporting reasons.

The text of section 1292(b) directly supports the conclusion that the jurisdiction of the court of appeals is governed by the order certified, not the question of law identified by the district judge:

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[1]We are at somewhat of a loss to understand why the United States entered this case to support petitioners, especially since Congress has exempted from the Federal Tort Claims Act claims "for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States." 28 U.S.C. § 2680(d). In addition, to our knowledge, the United States does not manufacture or distribute jet skis or other similar products that might give rise to claims such as are involved in this case.

> When a district judge, in making in a civil action *an order* not otherwise appealable under this section, shall be of the opinion that *such order* involves a **controlling question of law** as to which there is substantial ground for difference of opinion and that an immediate appeal from *the order* may materially advance the ultimate termination of the litigation, he shall so state in writing in *such order*. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from *such order*, if application is made to it within ten days after the entry of *the order*... .

28 U.S.C. § 1292(b) (emphasis added). There are six references made to the "order," whereas the phrase, "a controlling question of law," is mentioned only once. The repeated appearance of the word "order" strongly suggests Congress' concern that the order itself be immediately appealable, not that the appeal be confined to a specific question of law identified by the district court.

This interpretation is also supported by examining the rather different language of other interlocutory appeal statutes which are based on certification of specific questions of law. One such statute is 28 U.S.C. § 1254(2) (formerly § 1254(3)), which confers jurisdiction on this Court to review "[b]y certification at any time by a court of appeals of any *question* of law ... as to which instructions are desired" (emphasis added). Other examples include state statutes permitting certification of questions to state courts. *See, e.g.*, D.C. Code § 11-723 (providing that "[t]he District of Columbia Court of Appeals may answer *questions of law* certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State..." (emphasis added)); *Zant v. Stephens*, 456 U.S. 410, 416-17 n.4 (1982) (certifying a state law question under Georgia Code § 24-4536 which permits this Court to "certify such *questions* or propositions of the

laws of Georgia to [the Georgia Supreme Court] for instructions concerning such *questions* or propositions" (emphasis added)). Even when there is a certified question of law, this Court has recognized that it may make sense to decide other questions. *See* Sup Ct. Rule 19.2 ("When a question is certified by a United State court of appeals, this Court, on its own motion or that of a party, may consider and decide the entire matter in controversy. See 28 U.S.C. § 1254(2)").

Similarly, the language of § 1292(b) contrasts with Supreme Court Rule 14.1(a), which focuses on the "questions presented" in the petition for certiorari when describing the prudential boundaries of appellate review adopted by this Court: "The statement of any *question* presented is deemed to comprise every subsidiary *question* fairly included therein. Only the *questions* set forth in the petition, or fairly included therein, will be considered by the Court" (emphasis added). Despite that limitation, Rule 24(a) specifically allows this Court to "consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction." Thus, even where the grant of power is question-based, as opposed to order-based, there is leeway to decide other questions when appropriate. And here, where both the district court and the court of appeals have concluded under § 1292(b) that there are good grounds for an exception to the final judgment rule, there is no reason why Congress would have intended to forbid a court of appeals from exercising its discretion to address underlying questions of law that form the basis of the certified order under review.

The Court's decision in *Smith v. Vulcan Iron Works*, 165 U.S. 518 (1897), decided almost 60 years before section 1292(b) was enacted, lends further support to this conclusion. In *Smith*, this Court examined the scope of review under an 1891 statute, which is the predecessor of 28 U.S.C. § 1292(a)(1), authorizing interlocutory appeals from orders granting injunctions. *Id.* at 520. This Court determined that

the plain language of the statute permitted the appeal from the entire order and did not restrict the review in the court of appeals to the part of the order granting or continuing the injunction. *Id.* at 524; *cf. Swint v. Chambers County Comm'n*, 115 S. Ct. 1203, 1211 (1995) (acknowledging that this Court does not categorically require courts of appeals to confine their review to the precise ruling over which they have jurisdiction).[2]

Further support for the decision of the Third Circuit to exercise its discretion to address the displacement issue can be found in a closely analogous practice followed by this Court. In accordance with Rule 14.1(a), this Court has treated "prior" questions of law not explicitly mentioned but "predicate to [the] intelligent resolution" of the lower court's judgment as subsidiary issues "fairly included" in the question on which the Court granted certiorari. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980); *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978). In the spirit of Rule 14.1(a), this Court has sensibly held that it has discretion to decide a case on grounds not raised in the petition for certiorari. *See Izumi Seimitsu Kogyo v. United States Philips Corp.*, 114 S. Ct. 425, 428 (1993) (reaffirming such scope of review); *see also Public Citizen v. United States Dept of Justice*, 491 U.S. 440 (1989) (not addressing the constitutional grounds on which district

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[2] Indeed, when the courts of appeals have considered appeals from grants or denials of preliminary injunctions under 28 U.S.C. § 1292(a)(1), they have also reviewed denials of motions to remand to state court, even though such orders are not otherwise appealable. *See, e.g., O'Halloran v. University of Washington*, 856 F.2d 1375, 1378 (9th Cir. 1988); *Beech-Nut v. Warner-Lambert Co.*, 480 F.2d 801, 803 (2d Cir. 1973); *Kysor Indus. Corp. v. Pet, Inc.*, 459 F.2d 1010, 1011 (6th Cir.), *cert. denied*, 409 U.S. 980 (1972); *Mayflower Indus. v. Thor Corp.*, 184 F.2d 537, 538 (3d Cir. 1950), *cert. denied*, 341 U.S. 903 (1951).

court decided case, but affirming ruling on statutory grounds rejected by district court); *Lowe v. Securities and Exchange Comm'n*, 472 U.S. 181 (1985) (declining to reach constitutional question on which certiorari was granted, but deciding the case on statutory grounds not raised in petition). Although in these cases this Court was acting pursuant to the principle that courts should not address constitutional issues if a case can be decided on other grounds, *Lowe*, 472 U.S. at 190, the cases further substantiate the willingness of this Court to grant itself an expansive scope of appellate jurisdiction in the appropriate circumstances. For similar reasons of efficiency and prudence, and in the absence of any indication that Congress intended the discretionary jurisdiction under section 1292(b) to be limited to the precise question identified by the district court, this Court should likewise permit appellate courts to exercise a similarly reasonable scope of jurisdiction under § 1292(b).

Allowing the courts of appeals a reasonable degree of flexibility in exercising their discretionary jurisdiction is necessitated by the structure of § 1292(b) and the appeals process. First, the district court identifies what it concludes are the controlling questions. If that determination is the limit of appellate jurisdiction, § 1292(b) is a very narrow grant of authority. That result would be particularly surprising since § 1292(b) itself does not even require the district court to include the controlling question of law in its certification order.

Second, interlocutory review under § 1292(b) generally involves two different sets of judges, one granting leave for appeal and another conducting the actual review. *See, e.g.*, 3rd Cir., Internal Operating Procedures 10.1-10.3. Typically, a motions panel passes on petitions for § 1292(b) review, which must be filed within ten days of the district court's certification order. Not surprisingly, the motions panel does not delve deeply into the merits at this stage; in this case, review was granted within 25 days of the certification order by the district court. However, once

review is granted, the appeal is referred to a merits panel, and the parties submit full briefs from which the court can properly dispose of the appeal.

In light of the expedited manner of accepting petitions for immediate appeal, limiting the scope of appellate review would unduly penalize the parties and the merits panel where the district court or the motions panel failed to identify the proper pivotal question of law. The problem is likely to surface only after the merits panel has had an opportunity to become better informed about a case, following the submission of the briefs. At that point the panel would either have to dismiss the appeal, or perhaps send it back for recertification of another question of law.

In concluding that the Third Circuit properly reached the displacement question in this case, respondents are not asking this Court to create or expand an exception to the final judgment rule, as was urged in *Swint*, *supra*, and *Johnson v. Jones*, 115 S. Ct. 2151 (1995). Unlike both of those cases, the Third Circuit already had jurisdiction here to review the district court's interlocutory order under § 1292(b). Thus, permitting the court of appeals to decide the displacement issue would not obstruct the resolution of this case in the trial court, since that court itself had certified that "an immediate appeal would materially advance the ultimate termination of litigation," as § 1292(b) requires. To the contrary, deciding whether federal or state law applied in this case will achieve the purpose sought by § 1292(b): to allow appeals courts to decide controlling questions of law, thereby conserving time and resources for courts and litigants alike.

Since neither the language of § 1292(b) nor general principles of appellate review preclude courts of appeals from exercising jurisdiction over an antecedent question of law that forms the basis of the certified order, the court of appeals had jurisdiction to decide the issue of whether state or federal law governed this case. As we now demonstrate, the court

properly concluded that federal maritime law did not displace the state laws on which respondents relied.

II. THE COURT OF APPEALS CORRECTLY HELD THAT MARITIME LAW DOES NOT DISPLACE STATE LAW IN THIS CASE.

The principal argument in support of displacing state law in this wrongful death case assumes that this Court has adopted a general rule that federal maritime law leaves no room for the application of state law in the territorial waters of the United States. But petitioners and their *amici* fail to recognize that, in each of the cases on which their argument rests, this Court has identified one or two special factors that mandated federal supremacy. Indeed, far from prescribing a general rule of displacement, this Court has repeatedly observed that state law may apply to maritime torts unless certain factors are present which require that state law be displaced. At the outset, therefore, we review the relevant factors that need to be examined in each case in deciding which law to apply to the tort alleged. We then review the prior case law and statutes that bear on the issue presented and apply their teachings to this case. Finally, we point out the many policy reasons which counsel against adopting the displacement theory offered by petitioners and the United States.[3]

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[3]At several places in their brief, petitioners frame the issue as whether the general maritime law "applies" to this case (Br. 10, 11), or whether admiralty jurisdiction "extends to recreational boating" (Br. 11). Respondents do not argue that those seeking compensation for deaths such as that which occurred here are foreclosed from relying on general maritime law, although the issue is by no means clear. *See infra* at 32-34. The only issue here is whether general maritime law is the *only* law on which respondents may base their claims because that law has displaced all state laws dealing with deaths in territorial waters.

A. *The Relevant Factors*

The arguments made in support of displacement are not based on any federal statute, but on cases of this Court, many of which actually create, rather than displace, causes of actions for wrongful death. In addition, petitioners and their *amici* rely on many of those cases for what they say, rather than what they hold. As we show in part B, their principal authorities are all distinguishable because of the presence (or absence) of one or more factors which have determined the outcome in each instance. To guide the Court in considering those cases, we list below the relevant factors to examine before deciding whether a case is comparable to this one. Most significantly, and unlike any other case decided by this Court, this case involves the death of a civilian caused by someone other than the victim's employer, and it occurred in territorial waters, where there is no federal statute that creates a remedy for any person who is not a maritime employee.

- Location of accident/wrongdoing — high seas, territorial (navigable) waters of the United States, inland waters, or land.
- Status of victim — seaman, longshore worker, or civilian, which includes persons engaged in recreation in or on the water, as well as non-maritime workers and guests who are aboard a vessel.
- Identity of defendant — the employer, the owner of a vessel, or a non-maritime (civilian) entity, including land-based entities such as petitioners.
- Nature of claim — personal injury, wrongful death, or survivorship.
- Basis of liability — negligence, unseaworthiness, absolute liability, or negligence without a contributory negligence bar.

• Law relied on — general maritime law, the Death on the High Seas Act, the Jones Act, the Longshore & Harbor Workers' Compensation Act, or state law.

• Items of damages sought — medical expenses, earnings (past/future), funeral expenses, pain and suffering, loss of society (consortium) — with the major subdivisions being pecuniary and non-pecuniary losses.

Although not all of these factors are involved in each of the cited cases, usually one or two of them is ultimately dispositive to both the holding of the Court, and, importantly, to the precise limits of the Court's decision. As the following discussion demonstrates, this Court has found displacement of state law primarily where Congress has enacted directly-applicable legislation, and it has never adopted a general rule favoring displacement of state law, especially where claims for wrongful death are involved.

B. *The Relevant Decisions and Statutes.*

This saga of the sea begins with the decision of this Court in *The Harrisburg*, 119 U.S. 199 (1886), where a seaman was killed when his ship collided with another vessel in coastal waters off Massachusetts. His heirs brought suit against the offending vessel for wrongful death, relying on the general maritime law. This Court rejected the plaintiffs' claim on the grounds that, absent a statute, there was no such action as wrongful death at common law, and it refused to create one in the maritime setting either. *Id.* at 213. Since the Calhouns are relying on state law for their wrongful death claim, it is particularly significant that a similar state law claim in *The Harrisburg* was foreclosed only because the heirs had allowed the state statute of limitations to expire. However, the opinion makes clear that the state law action would have been available had it been timely filed. *Id.* at 214.

Almost 85 years later in *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court overruled *The Harrisburg* and recognized a general maritime wrongful death cause of action under federal common law. In a lengthy, careful, and unanimous opinion by Justice Harlan, the Court reviewed both the basis of *The Harrisburg* decision itself, which it found generally lacking in persuasiveness, and the various federal statutes that Congress had passed in the interim, in particular the Death on the High Seas Act, 41 Stat. 537 (1920), codified at 46 U.S.C. §§ 761; the Jones Act, which was originally passed as 38 Stat. 1185 (1915), was amended on several occasions, and is now codified at 46 U.S.C. App. §§ 688; and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), which was first passed in 1927, 44 Stat. 1424, and is now codified at 33 U.S.C. §§ 901.

The accident in *Moragne* involved a longshoreman who was working aboard a vessel in the territorial waters of Florida, and his death resulted in a suit against the owner of the vessel. The Court overruled *The Harrisburg* and held that his heirs had a right to recover under the general maritime law of unseaworthiness. Before explaining how the Court arrived at that position, it is important to note that the plaintiffs in *Moragne* had a pending wrongful death claim under Florida law based on negligence. However, since Florida law did not allow claims based on unseaworthiness — which imposes "an absolute duty not satisfied by due diligence," *Moragne*, 398 U.S. at 399 — such a claim could only be advanced under the general maritime law. Indeed, the motion to dismiss made by the vessel owner and the employer of the decedent solely attacked the claim of unseaworthiness, and left intact the state wrongful death claims based on negligence, similar to those advanced by respondents here. Thus, there was no dispute that plaintiffs' state law claim was valid, and the only question was whether an additional remedy was available under general maritime law based on the doctrine of unseaworthiness. *Id.* at 377.

The Court ultimately rested its decision in *Moragne* on Congress' enactment of various federal statutes which, in the Court's view, compelled a different result from *The Harrisburg* because they evidenced a strong public policy that maritime deaths should not go uncompensated. The Court acknowledged that the passage of the legislation might suggest limiting non-statutory maritime remedies, *i.e.*, the federal statutes might evidence a congressional intent to preclude other wrongful death actions not specified in the statutes. *Id.* at 392-93. After reviewing both the statutes and their legislative history, however, the Court rejected that view and concluded that, while those statutes were limited to the circumstances set forth therein, they were all directed at compensating persons who had been killed or injured in maritime accidents, and therefore did not preclude judicially-created remedies in other circumstances. *Id.* at 393-402.

In his opinion, Justice Harlan made multiple references to the continued availability of state law remedies that would exist concurrently with the remedy which the Court recognized in that case for unseaworthiness under the general maritime law for deaths occurring in territorial (navigable) waters. *See, e.g., id.* at 393, 395-97, 398, 399-400, 401 n.15, 408. *See also Romero v. International Terminal Operating Co.*, 358 U.S. 354, 372-76 (1959)(detailing extensive role of state law in maritime matters, including wrongful death remedies). Thus, while *Moragne* created a maritime cause of action for wrongful death in territorial waters, there is nothing in the opinion to suggest that the Court intended to eradicate prior existing remedies under state law.[4]

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[4]The discussion at 398 U.S. at 400-01 regarding uniformity could be read to support petitioners, except that footnote 15, which comes in the middle of that discussion and specifically refers to the availability of state remedies in *The Harrisburg*, makes it clear that

(continued...)

Indeed, the Court expressly acknowledged that, even after DOHSA was enacted, "state remedies in territorial waters were not disturbed [which] ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed." *Id.* at 398. Under this Court's standard preemption analysis, it is the intent of the entity creating the scheme allegedly causing the preemption — usually Congress, sometimes a regulatory agency, but here this Court in *Moragne* — that is the touchstone of preemption analysis. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992). Because nothing in *Moragne* suggests that this Court intended, in the course of creating a new federal maritime remedy in wrongful death cases based on claims of unseaworthiness, to eradicate the long-standing state remedies allowing recovery in cases of wrongful death, there is no basis for a finding of preemption, or, in nautical terms, displacement.

Among the cases that this Court has decided since *Moragne* on the general topic of recoveries for wrongful death in territorial waters or on the high seas, the three on which petitioners and their *amici* place greatest reliance are *Off-Shore Logistics, Inc., v. Tallentire*, 477 U.S. 207 (1986), *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), and *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Properly read, however, those cases are readily distinguishable, based on both the factors outlined above and the policies underlying their holdings.

In *Tallentire*, two workers on an oil platform 35 miles off the Louisiana coast were killed when the helicopter transporting them to their work site crashed on the high seas. Invoking Louisiana's wrongful death statute, the decedents'

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[4](...continued)
there was no intent by the *Moragne* Court to abolish state law remedies.

wives sought to recover non-pecuniary damages, such as loss of service and society, in addition to the pecuniary damages recoverable under DOHSA. This Court held that DOHSA, including all of its terms and conditions, covered all deaths occurring on the high seas and that it precluded the application of any state statute for any death on the high seas.

Petitioners read *Tallentire* far too broadly by attempting to extend the Court's analysis to a general preclusion of all state wrongful death statutes for maritime torts, regardless of the location of the accident. In so doing, however, petitioners ignore three crucial pillars of the analysis in *Tallentire* that not only distinguish *Tallentire* from this case, but support the position that a general maritime remedy does not displace all state remedial statutes. First, this Court based its decision on the fact that a statute (there DOHSA), enacted by Congress, expressly created a remedy for the very injury on which the lawsuit was based. This case, by contrast, involves no federal statute; Congress has decided not to provide an express remedy for an injury or death of a civilian in territorial waters. Therefore, the application of state law remedies here would do nothing to thwart congressional objectives.

Second, the majority opinion makes clear that state laws continue to apply to deaths of non-seamen in territorial waters. *Tallentire*, 477 U.S. at 221, 225. The Court held that the first sentence of the broad savings clause contained in section 7 of DOHSA, 46 U.S.C. § 767, which provides that "the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter," did not permit the application of state wrongful death statutes to deaths on the high seas. However, the Court concluded that the clause did not forbid all non-DOHSA wrongful death remedies since section 7 was also intended to ensure that "state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and,

under DOHSA, for accidents occurring more than one marine league from shore." *Id.* at 221. In fact, the Court specifically noted that, when DOHSA was enacted, "[i]t had been recognized that states could 'modify' or 'supplement' the federal maritime law by providing a wrongful death remedy enforceable in admiralty for accidents on territorial waters." *Id.* at 224. Moreover, as the *Tallentire* majority recognized, the second sentence of section 7 — which makes DOHSA inapplicable "to the Great Lakes or to any water within the territorial limits of any State" — directly supports respondents. *Id.* at 227 (savings clause "did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the savings clause did in territorial waters"). And since the dissenters would have read the savings clause to apply to all wrongful death cases, even those occurring on the high seas, the conclusion that at least the second sentence in section 7 saved state wrongful death claims in state territorial waters was unanimous.

Even if the savings clause in DOHSA did not save state law remedies in territorial waters, that omission would hardly aid petitioners since DOHSA provides a cause of action only for deaths on the high seas, not for deaths in territorial waters. Hence, the statute need not "save" anything because there is no generally applicable federal remedy for deaths where Natalie Calhoun was killed. Thus, in displacing state remedies for wrongful death, the *Tallentire* Court limited its decision to the high seas — the "area where the federal interests are primary." *Id.* at 233. *See also id.* at 224-25 ("[b]ecause DOHSA by its terms extended only to the high seas, and therefore was thought not to displace these state remedies on territorial waters, § 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court")(citation omitted).

Third, regardless of how one reads the savings clause in DOHSA, the Court in *Tallentire* provided a substantial, independent policy rationale for making remedies under that

statute exclusive for deaths that occur outside the three mile territorial limit. The Court observed that DOHSA limits the class of beneficiaries ("wife, husband, parent, child, or dependent"), the time within which the action may be brought (three year statute of limitations), the available damages to pecuniary losses, while at the same time eliminating contributory negligence as a bar. *Id.* at 215. Thus, *Tallentire* should not be read simply as calling for uniformity of damages in the federal system, but as a judicial recognition that the comprehensive scheme created by Congress emerged from a balancing of the interested persons — victims, employers, shipowners, families, and others — who are concerned about deaths on the high seas, a balance that the courts should not disturb.

Once again, Congress has struck no comparable balance here since it has not created a federal maritime remedy for deaths occurring in territorial waters. Accordingly, for these reasons, *Tallentire* has no bearing on the outcome of this case, except to the extent that it highlighted this Court's prior explicit recognition of the continued viability of state wrongful death statutes in territorial waters — a recognition that supports the Calhouns, not petitioners.

These considerations are similarly evident in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), a case also arising under DOHSA. There, the heirs of a longshoreman killed in a helicopter crash 100 miles at sea attempted to use general maritime law to recover damages for loss of society, which are unavailable under DOHSA. This Court rejected that effort since "Congress has struck the balance for us" among all competing policy considerations that define the statute's priorities and limit its scope. *Id.* at 623. Here, however, the Court is not confronted with a similar congressional command since no federal statute prescribes remedies available to civilians for deaths in territorial waters. *See id.* at 626 (Marshall and Blackmun, JJ., dissenting: recovery "turn[s] solely on a ship's distance from shore at the time of the injury causing death"). Thus, *Higginbotham*

is a variation on *Tallentire*; both refuse to alter express congressional limitations on recoveries for accidents on the high seas, in favor of either the general maritime law or a state statute.

The other case on which petitioners and their *amici* place great reliance, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), is also irrelevant to a determination of whether state law should be displaced by general maritime law. In *Miles*, as in *Tallentire*, Congress had spoken on the issue before the Court, and the only remaining question was whether other, different remedies continued to be available. The decedent in *Miles* was a seaman, an occupational status explicitly covered by the Jones Act, who was killed on a vessel docked in territorial waters. The suit included a negligence claim under the Jones Act and a *Moragne* claim based on the vessel's unseaworthiness. In addition, to pecuniary damages available under the Jones Act, the complaint asked for non-pecuniary damages under *Moragne*, as supplemented by *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). As the Court had done earlier in *Tallentire* and *Higginbotham*, it denied the broader recovery, holding that the Jones Act was the exclusive basis for determining the measure of damages for seamen, regardless of whether the death occurred on the high seas or in territorial waters. Once again, since Natalie Calhoun was not a seaman, the Jones Act is inapplicable, as is the exclusivity rationale relied on in *Miles*.

Like *Tallentire*, the *Miles* Court based its analysis on deference to congressionally-expressed policy determinations. Of particular significance was its recognition that, even though the conduct at issue was specifically covered by the Jones Act, the claim based on general maritime law, which provided the applicable standard of conduct, was *not* displaced and that a claim for unseaworthiness survived, even for a seaman covered by the Jones Act. *Id.* at 30. However, the Court limited the type of recovery to pecuniary losses, which is what the Jones Act provides, finding that

Congress intended those damages to be the exclusive types recoverable. *Id.* at 36 ("We will not create, under our admiralty powers, a remedy . . . that goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death"). Since the Jones Act does not apply here, there is no reason to believe that the general maritime law alone would displace state law remedies for wrongful death.

Indeed, in *Miles* itself, the Court recognized that, when "Congress passed the Jones Act and DOHSA, federal courts uniformly applied state wrongful death statutes for deaths occurring in state territorial waters." *Id.* at 24. The Court went on to observe that "Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas." *Id.* at 25 (citing *Moragne*, 398 U.S. at 397-98). *See also Miles*, 498 U.S. at 34 (noting that state survival statutes had been specifically recognized by the Court as being preserved when the remedy in *Moragne* was created); Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 3672 at 359 (Supp. 1995) (concluding that, although DOHSA limits the recovery available for persons killed on the high seas, "if the same accident occurs within a marine league from shore where [DOHSA] has no effect, the survivors can recover damages under the state wrongful death statute, including, when provided, reimbursement for non-economic losses").

From these and other cases, certain propositions become clear. First, the Death on the High Seas Act provides the exclusive measure of recovery for any death beyond the three mile limit, except for seamen whose remedies are governed by the Jones Act. Since the accident here occurred within territorial waters, DOHSA is irrelevant to respondents' claims.

Second, statutes that create rights based on a person's status, such as the Jones Act (seamen) or the Longshore and Harbor Worker's Act (longshore workers), provide the exclusive measure of damages for a person in that

occupational status. Nonetheless, under *Miles*, seamen may still rely on the general maritime doctrine of unseaworthiness to establish liability (longshoremen no longer can because of the specific statutory exclusion in 33 U.S.C. § 905(b)), but they cannot obtain damages for wrongful death in excess of those provided in the statute, whether on the high seas or in territorial waters, or, in the case of longshoremen, on land. The rationale for these decisions is that Congress has spoken on the remedies available to individuals in these occupations, and that the level of compensation has been provided in exchange for a complicated set of rights and benefits. Since Natalie Calhoun, age 12, was not employed in any capacity, let alone as a seaman or a longshoreman, those statutes do not apply to her. Because Congress has never addressed the type of benefits that a civilian killed in territorial waters should receive, states remain free to fashion their own legislative remedies.

Third, the viability of state law was recognized both in and before *The Harrisburg*, in *Moragne*, and in all of the principal cases since then, including *Higginbotham*, *Tallentire*, and *Miles*. No case of this Court has held that state law does not apply, except with respect to those situations in which Congress has explicitly legislated for a location (DOHSA) or based on the status of the individual (Jones Act or LHWCA).

Despite the protestations of petitioners and the United States, the basic message of *Moragne* was not to displace other laws, but to be generous with maritime remedies. This Court overruled *The Harrisburg* because it was concerned that there were inadequate remedies for deaths in territorial waters, not because there were too many remedies or state law was interfering with federal maritime law. It is important to recall that the Court could have said in *Moragne* that *The Harrisburg* was the law when Congress passed the Death on the High Seas Act, the Jones Act, and the Longshore and Harbor Workers' Compensation Act, and that, by choosing *not* to extend remedies to territorial waters

in those statutes, Congress intended to preclude the courts from doing so also. This Court rejected that rationale, and instead adopted the generous policies of those statutes and expanded them to provide a cause of action under general maritime law for a death occurring in territorial waters. That policy of generosity cannot be reconciled with petitioners' plea for a finding of displacement here.

The argument against displacement of state laws in this situation is especially strong since there is no federal statute on point. Indeed, the Court went so far as to say in *Miles* that, even though the Jones Act applied, the "general maritime cause of action for the wrongful death of a seaman" in territorial waters still survives, 498 U.S. at 30, although it did limit the types of damages available. And where this Court has found exclusivity, it has done so only where there was a congressional determination in a specifically-applicable statute, either because of location — on the high seas — or status — seaman or longshoreman. It is only in those circumstances that the Court has limited otherwise available federal or state remedies. Since there is no federal statute covering death in territorial waters or that applies to civilians, let alone one that applies to both, there is no basis to displace state law.

Moreover, in the non-maritime context, there is a strong presumption against preempting state laws. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985) (refusing to preempt state regulations, despite comprehensive federal regulation, because states are entitled to identify additional regulatory needs and impose further requirements). Even when there is a federal statute related to the cause of action, courts must construe the federal statute in a way that avoids conflict, and thus preemption, of a state rule. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (Sherman Act does not preclude additional remedies under state antitrust law). This presumption in favor of preserving elements of state policy has been incorporated into the admiralty law by requiring a

"clear conflict" before a federal rule will preempt a state rule. *Askew v. American Waterways Operators*, 411 U.S. 325, 342 (1973). *See also Kelly v. Washington*, 302 U.S. 1, 15 (1937) (preserving state action for unseaworthiness); *Huron Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) (upholding anti-pollution ordinance in navigable waters). Here, because there is not even a federal statute that the courts must narrowly construe, the general maritime law cannot destroy the presumption against preemption that is accorded state remedial statutes.

As this Court recognized in an analogous context, those who seek to displace state law and to "create a special federal rule" must satisfy "a heavy burden," especially in the absence of a significant conflict with a federal statute. *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2053, 2055 (1994). Not only is there no strong federal statutory policy that would warrant the displacement of state law, but, as we now show, there are many reasons why federal law should not be applied here.

C. *There Are Many Reasons Not to Displace State Law.*

At the outset, it is necessary to be clear about what would be displaced, and what would not, if petitioners' views were accepted. According to petitioners, they seek the applicability of general maritime law, with whatever limits on damages there may be, to all cases of wrongful death in the territorial waters of the United States. If such a claim exists in this situation under general maritime law (*but see infra* at 32-34), it would be based not simply on negligence, but also on unseaworthiness, although the precise terms and conditions on which such an action would be maintained were left open in *Moragne*, 398 U.S. at 406-07. But whatever conditions may apply, there can be no doubt here that the parents of Natalie Calhoun would be entitled to be plaintiffs in any action under the general maritime law.

Nonetheless, the wholesale and exclusive use of federal maritime law would create substantial problems that further counsel against displacement.

1. Preserving State Wrongful Death Remedies Will Not Affect the Primary Conduct of Jet Ski Manufacturers.

To determine if state law should be displaced, this Court has asked whether a uniform federal standard is necessary in order to govern primary conduct. Thus, in *American Dredging Co. v. Miller*, 114 S. Ct. 981 (1994), this Court rejected a claim that the interests of uniformity required a state court to follow federal *forum non-conveniens* rules in a Jones Act case. Instead, the Court concluded that the state rule was procedural and not one "upon which maritime actors rely in making decisions about primary conduct — how to manage their business and what precautions to take." *Id.* at 987, 988-89. Likewise, in *O'Melveny & Myers*, the Court rejected the argument for a uniform federal standard governing the conduct at issue there because the primary conduct did not involve that of the United States or its agents. 114 S. Ct. at 2055; *see also id.* (warning that assertion of uniformity alone may prove too much).

Examining the issue of primary conduct in this case makes it clear that the rationale for uniformity is inapplicable here. Surely, the application of Pennsylvania's wrongful death remedy in this case will have no effect on the primary conduct of any seaman, longshoreman, or employer. Nor can the owner of a vessel argue that its primary conduct would be affected by the rule here since the "vessel" here is not owned by petitioners, although they did design and manufacture it.

More fundamentally, focusing the displacement inquiry on the effect that a state wrongful death statute will have on primary conduct makes it clear, for several reasons, that a

ruling supporting petitioners would have a negligible, if any, impact on the basic operations of jet ski manufacturers. First, jet skis are heavily used on inland waters in Pennsylvania and elsewhere. Since inland lakes are not territorial waters, state law, not *Moragne*, would cover all of the elements of a jet ski accident there, whether it resulted in death or personal injuries. Thus, petitioners now have to comply with whatever standard of conduct the laws of 50 states generally require, since it is impossible for them to know where a particular jet ski might ultimately be utilized.

Indeed, the description of petitioners' business activities in their brief reveals that they also manufacture "motorcycles, snowmobiles, generators, scooters, all-terrain vehicles, personal watercraft, outboard motors and golf cars." Br. at ii. Therefore, to the extent that the problems that caused the death of Natalie Calhoun on territorial waters are similar to those that might occur for petitioners' other products on land or on water (inside a state's borders), there will be no uniformity unless federal and state law happen to coincide.

Second, most jet ski accidents do not result in death, but injuries — some serious and some not. Despite the assertions of petitioner and their *amici*, it is *not* settled that state personal injury law would be displaced in any case not involving death. *See infra* at 31-32. Hence petitioners' primary conduct, and the need to maintain appropriate insurance or self-insurance to protect against tort claims, would be the same regardless of the outcome in this case. That is true because it is impossible to predict whether faulty manufacturing and/or design would result in death or "merely" serious injury, which would probably be subject to state law, wherever the accident occurred.

2. Uniformity is Not a Dispositive Consideration in Admiralty Displacement Analysis.

With respect to the much vaunted concerns about uniformity, this Court has ruled that, standing alone, they are never dispositive. *See American Dredging*, 114 S. Ct. at 987 ("The requirement of uniformity is not, however, absolute"); *Mobil Oil*, 436 U.S. at 624 (uniformity not an overriding consideration); *see also O'Melveny*, 114 S. Ct. at 2055. In fact, there are many other instances of disuniformity already tolerated in the federal maritime law. For example, in *Miles*, the Court determined that survivors of seamen were not entitled to loss of society damages, at the same that it acknowledged that state wrongful death remedies, including loss of society, would be available to non-seamen in territorial waters. 498 U.S. at 30-32. Thus, uniformity did not overcome congressionally-mandated differences based on occupational status.

Further evidence that Congress has not adopted uniformity as a beacon to be followed invariably is found in federal statutes that expressly legislate disuniformity in more closely related situations than is the death of Natalie Calhoun to the typical maritime worker's demise. Thus, while a seaman's heirs are entitled to both survival damages and wrongful death damages under the Jones Act for deaths occurring on the high seas, DOHSA expressly limits non-seamen to only wrongful death damages. A similar disuniformity exists regarding the basis of liability. If a seaman and non-seaman were both killed in territorial waters due to an unseaworthy but non-negligently maintained vessel, only the seaman would recover for unseaworthiness under the general maritime law, since there is generally no unseaworthiness cause of action available to civilians. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Finally, as *Moragne* itself recognized, even when Congress has created statutory remedies for wrongful

deaths, "each of these provisions differs slightly in the naming of dependent relatives who may recover and in the priority given to their claims." 398 U.S. at 406-07.

The fact that there are different measures of damages, different persons who are entitled to sue for wrongful death, and perhaps different standards of liability under federal and state law, are all functions of our federal system with which we have lived for more than 200 years. If Congress believes that uniformity is sufficiently important, there is no doubt that it has the power to act, just as it did in the Death on the High Seas Act. Indeed, in 1980 Congress imposed a uniform statute of limitations period for all maritime torts, federal or state, regardless of where they occur. 46 U.S.C. § 763a. *See, e.g., Francis v. Forest Oil Corp*, 628 F. Supp. 836, (W.D.La.), *appeal dismissed,* 798 F.2d 147 (5th Cir. 1986)(federal statute's three year limit trumps one year Louisiana period). The predecessor statute of limitations provision, 46 U.S.C. § 762, now repealed, applied only to deaths and only to those on the high seas. Congress, not the federal courts, decided that uniformity was desirable, and imposed it, but only regarding the time within which an action must be brought. Until Congress has expressly legislated uniformity for the type of damages available from deaths in territorial waters, for persons who are not maritime workers, Natalie Calhoun's heirs are entitled to bring this wrongful death case relying on state law if they so choose.[5]

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[5]Although reliance on state law is generally beneficial to claimants, in some situations claimants obtain benefits under state law in exchange for surrender of other rights, in which case it is the defendant that would gain from the plaintiff's use of state law remedies. See *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990) (for land-based employee injured while on boat transporting him to a job on island, state workers compensation benefits held to be exclusive remedy, and general maritime law is inapplicable).

To support displacing state law on the supposed need for uniformity, the United States cites several cases which, it asserts, stand for the proposition that federal law is exclusive within the admiralty jurisdiction (Br. 15-17). We have already established that *Moragne* and other wrongful death cases specifically recognized state claims as co-existing with federal law, except where Congress has otherwise preempted the field, as it did in DOHSA and the Jones Act. The cases the United States relies on, with the exception of the long-questioned decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), do not hold that federal law always applies to claims for personal injuries arising in territorial waters. Properly read, these cases merely reject the use of state law in the circumstances presented there because its application would have undermined federally-created rights.

Thus, in *Pope & Talbott, Inc. v. Hawn*, 346 U.S. 406, 408-09 (1953), state common law was held not to apply to a claim of unseaworthiness because "the harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice." In *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959), the Court refused to import New York common law concepts into the general maritime law because the two jurisdictions imposed different standards of care, and the use of state law would incorporate "inappropriate common law concepts" into maritime law. And in *Panama R.R. v. Johnson*, 264 U.S. 375 (1924), the Court held that only the Jones Act, not state law, governs a seaman's suit against his employer.

Even in *Jensen*, where the Court rejected the application of a state law that would have favored the longshoreman-victim, it did so because the state law would have had the effect of altering substantive federal maritime law. But *Jensen* does not stand for the proposition that a state law which merely supplements federal law must be

displaced; state law affecting maritime commerce is invalid only "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law." 244 U.S. at 216. Assuming that even the limited displacement of state law in *Jensen* is still good law (*see e.g.*, *American Dredging*, 114 S. Ct. at 985 n.1; *id.* at 990 (Stevens, J. concurring)), it hardly supports the result urged by petitioners, nor is its application required here in order to sustain any federal maritime policy. Indeed, as this Court observed in *The Tungus v. Skovgaard*, 358 U.S. 588, 594 (1959), "[t]here is no merit to the contention that the application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law. Even *Southern P. Co. v. Jensen*, which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.' 244 U.S. 205, at 216." Since, as we have demonstrated above, nothing in *Moragne* was intended to displace the long-standing practice of recognizing state law wrongful death claims, pleading for uniformity does not supply the missing ingredient needed for a finding of displacement.

3. Imposing the General Maritime Law Would Further Complicate Maritime Tort Litigation.

It is important to note that, if petitioners' theory were adopted, the general maritime law would not only limit the amount of recovery for deaths in territorial waters, but it would also import unseaworthiness as a basis of recovery for any arguably maritime claim; if it did not create a uniform basis for judging primary conduct, the vital need for uniformity on which petitioners rely so heavily would disappear.

Although this Court has never decided whether an injury caused by a jet ski or even a jet skier can be based on a claim of unseaworthiness, it is clear that not every maritime claim can rely on that doctrine as a basis for recovery. Thus, in *Kermarec*, *supra*, 358 U.S. at 629, this Court ruled that unseaworthiness was not available to an invitee aboard a vessel docked in port, a far more likely candidate for applying the doctrine than is this case. Indeed, since the duty to maintain a seaworthy vessel is that of the owner, and since neither petitioner owned the jet ski on which Natalie Calhoun was riding, there are further reasons to doubt that wrong committed by petitioners was a maritime tort. Since there is at least a strong argument that respondents' claims here cannot be based on unseaworthiness, and since that was the basis for the claim in *Moragne*, there is no basis for a non-existent federal claim to displace existing state law remedies.

An unseaworthiness cause of action might make sense for the death of a passenger on a vessel in territorial waters, but it is difficult to envision how it would apply to the jet ski manufacturer in this case. A major difficulty in applying the concept of unseaworthiness here is that the wrongful conduct on which respondents' complaint is based did not occur on or near territorial waters, but on land, at the time of the design or manufacture of the jet-ski. Indeed, it is purely happenstance that the death from this jet-ski occurred on the navigable waters, rather than on an inland lake, or perhaps even on dry land if the specific cause of the malfunction of the jet ski was also found on petitioners' land-based craft, such as a snowmobile. Therefore, adopting the theory advanced by petitioners and the United States would create precisely the kind of "dissatisfaction" described by the United States in note 9, page 17 of its brief, by applying "peculiarly maritime duties, such as that of unseaworthiness" to the design and manufacturing activities that are involved in this case and that have virtually nothing to do with the law of the sea.

Indeed, it is arguable that the tort here is not a maritime tort at all. As this Court recognized in a series of cases, all torts occurring on or over the water are not automatically maritime wrongs. *See Sisson v. Ruby*, 497 U.S. 358 (1990). To come under admiralty jurisdiction, the harm still must bear a substantial relationship to seagoing activities. *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995). If this Court were to rule that general maritime law displaces all state law, the scope of its decision would presumably be limited to those cases that involve a genuine maritime tort. *See Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 1487 (1995) (no preemption when there is no federal law to replace state claim). Therefore, in every case that is only *arguably* maritime, the courts would first have to determine if the action is *in fact* maritime before it could apply federal law. Yet, if the Court follows its current admiralty jurisprudence, under which federal maritime law coexists with, but does not displace, state law, *see Part B supra*, it will not have to confront the question, here or in other cases, of whether the tort at issue is sufficiently related to seagoing activity to be the subject of maritime law. In sum, a rule requiring displacement will inevitably require an additional and sometimes complex, and often unnecessary, inquiry into the character of the tort at issue.

Finally, one of the arguments made in *Moragne* against the creation of a maritime remedy for wrongful death in territorial waters was that it would require the courts to decide who could bring such actions, what damages were available, what statutes of limitations to apply, and how to deal with all of the other problems that are usually decided by state law, or by federal statutes where Congress has acted. Unlike the situation in *Moragne*, where federal law supplemented state law, if the Court were to hold that the *Moragne* remedy displaces state law, the courts will have to address those questions in every case, except for the statute of limitations issue, which Congress has answered by 46

U.S.C. § 763a. By contrast, when the only issue is whether there is an additional right created under general maritime law, there is generally no need to decide many of these questions.

* * * *

Despite the lengthy briefs of petitioners and their *amici*, it is difficult to discern any rationale for finding displacement, other than a reflexive call for uniformity. But that is a plea that should be directed to Congress, not this Court. There is no federal statute applicable to civilians who are either injured or killed in territorial waters, or in accidents involving essentially land-based design and manufacturing activities, such as those engaged in by petitioners here. Given the strong reluctance of this Court to displace state law, the interests of states in protecting their waterways, and the generosity toward state remedies exhibited in *Moragne*, there is, we submit, no reason for concluding that the long established right of the states to create wrongful death and survivorship remedies for persons injured and killed in accidents on their territorial waters has been somehow silently and secretly expunged by Congress or this Court. It may be that a uniform federal law regarding death on territorial waters would make sense, but that determination is for Congress, just as it was for Congress to both create and limit remedies for deaths on the high seas and for claims by seamen and longshoremen, and to create a uniform statute of limitations for all maritime torts.

CONCLUSION

For all of these reasons, the court of appeals correctly held that the district court erred in holding that state law was displaced in this case by the general maritime law. Accordingly, the judgment of the court of appeals should be affirmed, and the case remanded to the district court to decide respondents' state law claims.

Respectfully Submitted

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